

## Alabama Federal Magistrate Recommends Dismissal of Construction Defect Declaratory Judgment Action Due to Expanded Duty to Defend Standard

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While the starting point for assessing an insurer's duty to defend requires comparing the allegations contained within a complaint to the language contained within the insured's policy, the majority of states require an insurer to do more. In Alabama, a failure of the underlying complaint to allege damages falling within the policy's terms is not necessarily fatal to coverage – if there are facts provable by admissible evidence to place the loss within coverage.

The U.S. District Court for the Southern District of Alabama recently examined Alabama's broadened duty to defend standard in *Frankenmuth Mutual Insurance Company v. Gates Builders*, No. 20-00596, 2021 U.S. Dist. LEXIS 83645 (S.D. Ala. Apr. 29, 2021). In *Frankenmuth*, the magistrate judge was tasked with determining whether the court should abstain from hearing an insurer's declaratory judgment coverage action pending the resolution of the underlying state court action.

The underlying state court action arose out of an allegedly defective construction project. Frankenmuth's insured, Gates Builders, was hired to perform exterior and structural rehabilitation work at the Resort Conference Center Condominium (the Condominium) in Gulf Shores, Alabama. The project began in July 2014 and concluded in June 2015. In 2019, Gates Builders was informed that the Condominium's decks were sagging. Gates Builders shored up the decks and provided the Condominium with a quote for the cost of repairs. In July 2020, the Condominium's Association filed suit, alleging that the work performed in 2014 and 2015 was faulty and had caused damage to the Condominium.

Frankenmuth sought a declaration that it was not required to defend or indemnify Gates Builders for the underlying state court action because: (1) the damages were discovered in 2019, prior to the policy's inception date; (2) any damages discovered after the policy's inception were a continuation of the damages discovered in 2019; (3) the underlying lawsuit did not allege an "occurrence;" and (4) various exclusions applied.

The magistrate, relying on *Tanner v. State Farm Fire & Casualty Company*, 874 So. 2d 1058 (Ala. 2003), found that Frankenmuth's duty to defend would be determined not only by the allegations contained within the complaint, but also by facts ultimately proved by admissible evidence. As a result, Frankenmuth's duty to defend would "heavily depend on the factual development of the claims" in the underlying state court action.

Based on this finding, the magistrate recommended that the federal court abstain from hearing the declaratory judgment action, noting that any fact-finding at the federal level had the potential to "cause friction" with the state court's findings in the underlying state court action. The magistrate acknowledged that unlike the "occurrence" and exclusion coverage issues, the timing coverage issues with respect to Gates Builders' knowledge of the allegedly defective work did not "appear particularly relevant" of the underlying lawsuit. However, because the state court would "already be familiar with the work of [Gates Builders] in evaluating the [Condominium Association's] claims," the state court was in a better position to evaluate all coverage issues raised by Frankenmuth.

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